

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1482

To be argued by
KENNETH V. HANDAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1482

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT LOEWINGER, HARRY FINEROW,
LAWRENCE PUTZER AND RAY ADAMIAK,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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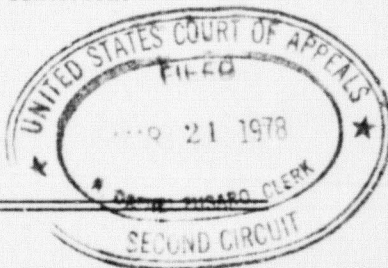


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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Robert Loewinger, Harry Finerow, Lawrence Putzer and Ray Adamiak appeal from judgments of conviction entered in November, 1977, in the United States District Court for the Southern District of New York after pleas of guilty before the Honorable John M. Cannella, United States District Judge.*

Indictment 77 Cr. 426, filed June 3, 1977, charged eleven defendants in four counts. Count One charged

* The defendants pled guilty subject to the express condition that they be allowed to preserve for appeal the denial of their pretrial motions to suppress evidence. This procedure has been approved by the Court. *United States v. Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States v. Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975); *United States v. Faruolo*, 506 F.2d 490, 491 n.2 (2d Cir. 1974).

Robert Loewinger, a/k/a "Bobby", a/k/a "Goo Goo", Norman Wertheimer, a/k/a "Normie", Sam Leventhal, a/k/a "Sam the Cop", Harry Finerow, Lewis A. Frielich, a/k/a "Larry", Lawrence Putzer, a/k/a "Larry", Morris Melavsky, a/k/a "Moe", Mac Fenster, Ray Adamiak, William DeMase, a/k/a "Bill", and Lester Fine, a/k/a "Les", with conspiring to conduct an illegal gambling business in violation of Title 18, United States Code, Section 371. Count Two charged the same defendants with conducting an illegal gambling business in violation of Title 18, United States Code, Section 1955. Count Three charged Finerow with using a telephone to transmit bets, wagers and wagering information in interstate commerce, in violation of Title 18, United States Code, Section 1084. Count Four charged Lewis Frielich with using a telephone to transmit bets, wagers and wagering information in interstate commerce, in violation of Title 18, United States Code, Section 1084.

After the filing of Indictment 77 Cr. 426, in addition to other motions filed by various defendants, ten of the eleven defendants filed motions to suppress evidence obtained pursuant to orders authorizing the interception of wire communications.* On October 6, 1977, Judge Cannella denied without a hearing all motions made by the defendants.

On October 14, 1977, Robert Loewinger, Norman Wertheimer, Sam Leventhal, Harry Finerow, Lewis Frielich, Lawrence Putzer, William DeMase and Lester Fine entered pleas of guilty to Count Two of the Indictment, and Mac Fenster entered a plea of guilty to Count One. Ray Adamiak and Morris Melavsky entered pleas of guilty to Count Two on October 19, 1977, and October

* Mac Fenster did not file a motion to suppress wiretap evidence.

21, 1977, respectively. Pursuant to an express condition of their pleas of guilty, Loewinger, Finerow, Putzer and Adamiak have appealed the District Court's rulings with respect to the motions to suppress the wiretap evidence.*

On November 29, 1977, Judge Cannella sentenced Robert Loewinger to two years imprisonment and a \$20,000 fine. On November 30, 1977, Harry Finerow and Lawrence Putzer each were sentenced to seven months imprisonment with execution of all but one month suspended and two years probation. Finerow was fined \$5,000 and Putzer was fined \$2,500. On November 28, 1977, Ray Adamiak was sentenced by Judge Cannella to seven months imprisonment with execution of all but one month suspended, two years probation and a \$3,500 fine.**

Loewinger, Finerow and Putzer are at liberty on bail pending this appeal. Adamiak is presently serving his sentence.

* By order of this Court dated January 25, 1978, Ray Adamiak was granted leave to adopt the brief of Finerow and Putzer.

** On December 15, 1977, Norman Wertheimer was sentenced to eighteen months imprisonment with execution of all but two months suspended, and he was placed on two years probation and was fined \$10,000. On December 19, 1977, Sam Leventhal was sentenced to one year imprisonment with execution of all but one month suspended, and he was placed on probation for two years. On November 30, 1977, imposition of sentence was suspended for Lewis A. Frielich and Morris Melavsky, and each was placed on probation for two years. Frielich was fined \$250 and Melavsky was fined \$7,500. Imposition of sentence for Mac Fenster was suspended on December 19, 1977, he was placed on probation for one year and he was fined \$500. On November 23, 1977, William DeMase was sentenced to seven months imprisonment, with execution of all but one month suspended, and he was placed on probation for two years and was fined \$1,500. On that same day imposition of sentence as to Lester Fine was suspended, and he was placed on probation for two years and he was fined \$100.

Statement of Facts

During the period from June 1976 through June 1977, the Federal Bureau of Investigation, in conjunction with local law enforcement agencies, conducted an investigation of a gambling enterprise operated by the eleven defendants named in Indictment 77 Cr. 426. This operation, hereinafter referred to as the "Loewinger Operation", was a sophisticated, large-scale, professional bookmaking operation which accepted wagers on horse races and sporting events. It was centered in Monticello and Ellenville in upstate New York, but extended to all five boroughs of New York City, as well as to Newburgh, Poughkeepsie, and Long Island in New York State, and the Scranton, Pennsylvania area. The various segments of the operation were tied together into a single operation by their practice of "laying off" bets to Robert Loewinger's bookmaking establishment. The practice of "laying off" bets consists of pooling bets to spread the risk.*

Wiretaps, as well as search warrants and other means of investigation, were used in the course of the investiga-

* "Laying off" bets is the transfer of excess wagers to another gambling establishment in order to balance the books, i.e., to accept the same amount of wagers on each side of the sports contest. In an affidavit dated December 30, 1976 in support of a wiretap order in this case "laying off" bets was described as follows:

In order to balance his books, the bookmaker attempts to reinsure himself by "laying off" bets on a favorite in excess of those placed on the remainder of the participants in a contest, that is, betting them again with another bookmaker who is willing to accept the additional "action". The bets thus reinsured are known as "lay offs" or "lay off bets." The bookmaker almost always uses the telephone to place his lay-offs because timing is crucial to this aspect of the bookmakers activities. The bookmaker decides what bets to lay-off after all the wagers have been placed. In turn he must place these lay offs with another bookmaker prior to the start of a sporting event or horse race. (Appendix of appellants Finerow and Putzer at 7-8).

tion. On December 30, 1976, the Honorable Thomas P. Griesa, United States District Judge for the Southern District of New York, signed orders authorizing the interception of wire communications and for the use of pen registers or similar devices on the following telephone numbers: 914-794-3244; 914-794-8026; 914-647-3422; 914-647-3412; 914-647-6691; 914-647-6358. The Government's application for the December 30, 1976 orders incorporated the affidavit of Carl W. Amaditz, Special Agent of the Federal Bureau of Investigation ("FBI"), dated December 30, 1976. Amaditz set forth in detail the probable cause that communications related to illegal gambling would be overheard on the aforementioned telephone numbers.

On March 9, 1977, the Honorable Frederick Van Pelt Bryan signed orders authorizing the interception of wire communications and for the use of a pen register or similar device on telephone number 914-794-0960. The Government's application for the March 9, 1977 orders incorporated another affidavit of Agent Amaditz, dated March 9, 1977. This affidavit incorporated by reference the facts alleged in Amaditz's affidavit of December 30, 1976.

The Amaditz affidavits demonstrated the existence of a single sports bookmaking enterprise with three segments, the Loewinger operation, the Leventhal operation and the Melavsky operation. The affidavits, which named nine subjects involved in the various segments of the operation, showed that the practice of "laying off" bets cemented the three groups into a single enterprise. Informant information contained in the affidavits indicated the subjects' manner of operation as well as the times and places that they accepted wagers and settled accounts. Physical surveillance demonstrated meetings among the subjects and presence at the appropriate times and places during the bookmaking hours pinpointed by the informants.

During the periods of electronic surveillance pursuant to the December 30, 1976 and the March 9, 1977 orders, numerous gambling related conversations involving all of the defendants named in the indictment were intercepted.

In ruling on the defendants' motions to suppress the wiretap evidence, Judge Cannella, in a memorandum decision dated October 6, 1977, found that a hearing on the motions was unnecessary because there were no controverted issues of material fact, and he denied the defendants' suppression motions. (Mem. at 1, 6-7; L. App. 81, 86-87).^{*} Judge Cannella held that there was a "more than sufficient showing" by the Government in the Amaditz affidavits of probable cause to believe that the subjects were involved in a gambling operation in violation of 18 U.S.C. § 1955 and that there was a particularized need for the electronic surveillance, as required by the statute. (Mem. at 2; L. App. 82). Judge Cannella further found that the reliability of the informants referred to in

^{*} "Mem." refers to Judge Cannella's memorandum decision denying the defendants' motions to suppress evidence derived from electronic surveillance. "Handal Aff." refers to the paragraphs of the affidavit of Assistant United States Attorney Kenneth V. Handal filed in the District Court on September 14, 1977, in opposition to the defendants' motions to suppress evidence derived from electronic surveillance. Most of the Government's factual allegations in this brief are based on this uncontradicted affidavit which contains a summary of the information contained in the affidavits of Agent Amaditz filed in support of the wiretap orders.

The Handal affidavit is printed at pages 63-80 of appellant Loewinger's appendix. Judge Cannella's decision appears in that appendix at pages 81-90. The Amaditz affidavit of December 30, 1976 ("First Amaditz Aff.") is printed at pages 1-40 of the appendix of appellants Finerow and Putzer. The Amaditz affidavit of March 9, 1977 ("Second Amaditz Aff.") appears in Loewinger's appendix at pages 12-52. "L. App." refers to the pages of the Loewinger appendix. "F. & P. App." refers to the pages of the appendix of Finerow and Putzer.

the affidavits was sufficiently established. (Mem. at 4; L. App. 84). The District Court also specifically rejected the defendants' claims that certain of the information contained in Amaditz's affidavits was stale. (Mem. at 7 n.3; L. App. 87 n.3).

ARGUMENT

The District Court's Decision Upholding The Wiretap Orders Was Entirely Correct.

The defendants offer a variety of attacks on the wiretap orders signed by Judge Griesa on December 30, 1976 and by Judge Van Pelt Bryan on March 9, 1977. They contend that the supporting affidavits are defective for four reasons: (1) the affidavits in support of the wiretap orders failed to establish probable cause; (2) the affidavits relied improperly on hearsay statements of informants who were not shown to be reliable; (3) the affidavits relied on stale information in establishing probable cause to believe that five or more people were engaged in an unlawful gambling enterprise; and (4) the affidavits failed to meet the requirements of 18 U.S.C. § 2518(1)(c) that the affidavit show why such techniques reasonably appear to be unlikely to succeed if tried or to be too dangerous. These arguments are without merit.

Judge Cannella's decision that probable cause existed to support Judge Griesa's issuance of the December 30, 1976 order was correct. (Mem. at 6-7; L. App. 86-87).*

* The determination of probable cause by the issuing District Judge is entitled to "great deference." *Spinelli v. United States*, 393 U.S. 410, 419 (1969); *Jones v. United States*, 362 U.S. 257, 270-71 (1960). See also *United States v. Becker*, 334 F. Supp. 546 (S.D.N.Y. 1971), *aff'd*, 461 F.2d 230 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Ramirez*, 279 F.2d 712, 716 (2d Cir.), *cert. denied*, 364 U.S. 850 (1960); *United States v. Scibelli*, 549 F.2d 222, 226 (1st Cir. 1977).

Probable cause for the December 30, 1976 as well as the March 9, 1977 wiretap orders was shown in the Government's applications for those wiretap orders and the supporting affidavits of Agent Amaditz. Those affidavits presented in detail the probable cause that existed for the issuance of the wiretaps.

The Amaditz affidavits set forth the observations of confidential informants—identified as Messrs. A, B, C, D, and E, and Number 1 and Number 2—, the underlying circumstances of those observations and the factual basis upon which it was determined that each informant was reliable, namely the informant's past furnishing of truthful information. Additionally, the informants' statements were corroborated both by information from other informants and by surveillance observations and independent investigation by the FBI agents themselves. *See, e.g., United States v. Esposito*, 423 F. Supp. 908 (S.D.N.Y. 1976) (Weinfeld, J.).

A. Probable Cause Existed for the Issuance of the District Court's December 30, 1976 Wiretap Order.

The Amaditz affidavit in connection with the December 30, 1976 order sets forth information from five reliable confidential informants as to the three groups involved in the gambling operation. (Handal Aff. ¶ 6; L. App. 64). Wiretap subjects who were identified in the affidavit as being involved in the Loewinger operation were Robert Loewinger, Norman Wertheimer and an unknown female who answered the telephone number 914-794-3244.

Two informants provided information as to the Loewinger group. Mr. A had placed bets as recently as December 12, 1976 with Loewinger and Wertheimer through telephone number 914-794-3244, which was listed

to Debra Scialabba. During December 1976 Mr. A also had personal conversations with Loewinger and Wertheimer and had overheard discussions between them about Leventhal's laying off bets with them. Mr. B had learned significant incriminating information from Melavsky (between April and December 1976), including that Melavsky was regularly laying off bets with Loewinger and that Loewinger and Wertheimer were partners in the largest volume bookmaking operation in the Catskill Mountain area.

This informants' information was corroborated by physical surveillance of Loewinger and Wertheimer. Amaditz set forth in detail the results of physical surveillance of Loewinger and Wertheimer conducted by FBI agents. This physical surveillance evidenced numerous meetings between Wertheimer, who had no visible means of employment, and Loewinger at a clothing store owned by the latter, as well as numerous observations of Loewinger and Wertheimer entering and leaving the premises of Nob Hill Colony, Kiamesha Lake, New York, at approximately the beginning and the end, respectively, of what Mr. A had said were the betting hours for the operation. (Handal Aff. ¶¶ 7-10; L. App. 65-66).*

Two informants, Mr. A and Mr. C, provided the basic information for the Leventhal operation. Mr. A had been placing bets with Leventhal since the first week of July 1976. Mr. C had placed bets with Leventhal as recently as December 12, 1976 on telephone number 914-794-8026 listed to a Gil Hellinger. Physical surveillance and independent investigation by the FBI corroborated the

* As reflected in the five, ten and fifteen day reports filed in the District Court, approximately 266 gambling related conversations were intercepted on telephone number 914-794-3244 between December 30, 1976, when Judge Griesa signed the 20-day order, and January 13, 1977, which was the last day included in the fifteen day report. (Handal Aff. ¶ 11; L. App. 67).

informants' information, including showing numerous meetings between Leventhal and Loewinger, with whom, Mr. A had advised, Leventhal was laying off bets.* Physical surveillance also showed Leventhal entering and exiting the address at which the 914-794-8026 telephone number was subscribed at approximately the appropriate bookmaking hours as stated by Mr. C. (Handal Aff. ¶¶ 12-17; L. App. 67-69).**

With respect to the Melavsky operation in Ellenville, New York, the Amaditz affidavit set forth information from three reliable confidential informants, Mr. D, Mr. B and Mr. E, all of whom were bettors with the Melavsky operation, which was known to include Morris Melavsky, Lewis Frielich, Harry Finerow, Lawrence Putzer and Robert Hannon. Mr. D had been placing bets with Melavsky and Frielich for eight months over telephone numbers 914-647-3442 and 914-647-3412, numbers listed to Lewis Frielich. These numbers had been given to him by Melavsky who told him they were used as part of a gambling operation conducted by himself and Finerow. As recently as the week of December 12, 1976, Mr. D had placed wagers at these numbers with Frielich. Mr. B advised that, from conversations with Finerow and Melavsky over the three years prior to the second week of

* Mr. A had placed bets with Leventhal at two other telephone numbers between July and mid-August, 1976 and between the latter part of August and September, 1976. Physical surveillance of the address at which each of these numbers was subscribed showed Leventhal entering and leaving the addresses at approximately the appropriate bookmaking hours. (Handal Aff. ¶ 15; L. App. 68).

** As reflected in the five, ten and fifteen day reports filed in the District Court, approximately 315 gambling related conversations were intercepted on telephone number 914-794-8026 between December 30, 1976, when Judge Griesa signed the 20-day order, and January 13, 1977, which was the last day included in the fifteen day report. (Handal Aff. ¶ 18; L. App. 69).

December 1976, he knew them to be conducting a book-making operation, with which Mr. B had been placing bets over telephone numbers 914-647-6691 and 914-647-6358, numbers listed to Morris Melavsky. Melavsky had told Mr. B that Finerow, Putzer and Hannon were also involved. Mr. E's information confirmed the information of Mr. D and Mr. B, in that during the week of December 5, 1976, Mr. E was told by Finerow that he and Melavsky were partners and in early November was told by Hannon that he worked for Finerow.

Physical surveillance corroborated the informants' information with respect to the Melavsky operation because it indicated meetings among members of the Melavsky operation.* Physical surveillance also showed meetings between members of the Melavsky operation and members of the Loewinger and Leventhal groups, thus corroborating Mr. A's and Mr. B's information as to lay off betting among the groups.** (Handal Aff. ¶¶ 19-24; L. App. 69-72).***

* Physical surveillance of Melavsky and Frielich between June 28, 1976 and December 13, 1976 indicated their arrivals and departures during the appropriate bookmaking hours at the addresses where they subscribed to the telephone numbers sought to be intercepted, thus corroborating the information supplied by Mr. D and Mr. B. Further corroboration of the information of the three informants was provided by physical surveillance that indicated meetings between Frielich and Melavsky and Finerow and Melavsky, and which also showed various arrivals and departures of Frielich, Finerow and Hannon at Melavsky's address and at Frielich's address, during and around the bookmaking hours. (First Amaditz Aff. ¶ 38; F. & P. App. 28-31).

** Amaditz also stated that independent FBI investigation showed that Loewinger, Wertheimer, Leventhal and Melavsky had records of prior arrests and convictions for the operation of illegal gambling businesses. (First Amaditz Aff. ¶¶ 41-44; F. & P. App. 33).

*** As reflected in the five, ten and fifteen day reports filed in the District Court, approximately 476 gambling related con-

[Footnote continued on following page]

B. Probable Cause Existed for the Issuance of the District Court's March 9, 1977 Wiretap Order.

The defendants do not seriously contest the existence of probable cause for the March 9, 1977 order, which authorized electronic interception of telephone number 914-794-0960, which was listed to Arthur Cohen, Bungalow #6, Nob Hill Colony, Kiamesha Lake, New York. The Amaditz affidavit in connection with the March 9 order incorporated the facts set forth in the prior affidavit.

The affidavit for the March 9, 1977 order pointed out that during the period of interception pursuant to the December 30, 1977 order Loewinger and Wertheimer had made only outgoing calls and had used the answering service to screen their calls. Extensive physical surveillance had pinpointed Bungalow #6, Nob Hill Bungalow Colony, Kiamesha Lake, New York as a meeting place of Loewinger and Wertheimer. Examination of telephone toll records and other independent investigation revealed, among other things, that the telephone number there, 914-794-0960, was used extensively during the standard bookmaking hours while Loewinger and Wertheimer were present, many times to telephone long-distance call-back numbers left with the answering service and also to call the answering service. Moreover, transcripts of conversations intercepted between January 5 and January 18,

versations were intercepted on telephone numbers 914-647-3442, 914-647-3412, 914-647-6691, and 914-647-6358 between December 30, 1976, when Judge Griesa signed the 20-day order, and January 13, 1977, which was the last day included in the fifteen day report. (Handal Aff. ¶ 26; L. App. 73).

1977 pursuant to the December 30, 1976 order revealed the exchange of line information (the point spread or odds on a sporting event) and the laying off of bets among the subjects of the order and several other persons on a daily basis.* (Handal Aff. ¶¶ 28-33; L. App. 73-76).**

C. The Informant Information in the Amaditz Affidavits Was Reliable, Was Fully Set Forth in the Affidavits, and the Affidavits Did Not Rely Improperly on Hearsay.

Loewinger challenges the reliability of the informant information presented in the Amaditz affidavits in support of probable cause. His general contention is that the affidavits fail to set forth underlying circumstances regarding the reliability of the informants and the credibility of their information. Specifically, he further claims that double hearsay was used in the affidavits and that Mr. C was not a reliable informant. These claims are without substance.

The Amaditz affidavits clearly provided "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Aguilar v. Texas*, 378 U.S. 103, 114 (1964);

* Amaditz also set forth information from two reliable confidential informants, identified as Informant Number 1 and Informant Number 2. Informant Number 1 advised that he placed wagers with Frielich on sporting events at telephone numbers 914-647-3442 and 914-647-3412 as recently as January and February 1977. Informant Number 2 advised that in mid-February 1977 Melavsky told him that he, Melavsky, continued to accept wagers on horse races and sporting events. (Handal Aff. ¶ 23; L. App. 72).

** As reflected in the five, ten and fifteen day reports filed in the District Court, approximately 578 gambling related conversations were intercepted on telephone number 914-794-0960 between March 9, 1977, when Judge Bryan signed the 20-day order, and March 23, 1977 which was the last day included in the fifteen day report. (Handal Aff. ¶ 34; L. App. 77).

United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 733 (1977). The reliability of all of the informants was established by their having previously furnished information concerning gambling activities and other criminal matters. With the exception of Mr. C, each of the informants had provided information which resulted in arrests and convictions. See *United States v. Vento*, 533 F.2d 838 (3d Cir. 1976). At no time had any of the informants been known to furnish false information. (Handal Aff. ¶¶ 7, 12, 19). The information that all of the informants provided in the instant situation was consistent with, and mutually corroborated by, information provided by other informants. Moreover, the informants' information was independently corroborated by the surveillance and independent investigation of the FBI agents. (Handal Aff. ¶¶ 10, 15-17, 23-25; L. App. 66, 68-69, 72). See *United States v. Becker*, 334 F. Supp. 546, 550 (S.D.N.Y. 1971), *aff'd*, 461 F.2d 230 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974).

The informants' information presented in the Amaditz affidavits showed specific and direct knowledge on the part of the informants. As stated in the affidavits, the informants' information was acquired through personal observations and dealings with those involved in the illegal gambling operation, principally by conversations with the subjects and by personally placing wagers and settling accounts with them. These statements by participants in the crime and thus "eyewitnesses" to the crime supply their own indicia of reliability, in marked contrast to the double hearsay rumor information presented by paid informants with no personal knowledge of the relevant events.* See, e.g., *United States v. Harris*,

* The affidavits do not present the situation referred to in *Spinelli v. United States*, 393 U.S. 410, 416 (1969), of "a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." See *United States v. Best*, 363 F. Supp. 11 (S.D. Ga. 1973).

403 U.S. 573, 583-84 (1971); *United States v. Rueda*, 549 F.2d 865, 869 (2d Cir. 1977); *United States v. Rollins*, 522 F.2d 160, 164 (2d Cir.), *cert. denied*, 424 U.S. 918 (1976); *United States v. Miley*, 513 F.2d 1190, 1204 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975).*

Ignoring the law in this Circuit that the previous reliability of a participant witness to the crime need not be shown, *see United States v. Rueda, supra*, 549 F.2d at 869, Loewinger specifically attacks Mr. C's reliability. However, the Amaditz affidavit showed the previous reliability of Mr. C. Amaditz stated in the December 30, 1976 affidavit that he had found Mr. C's information to be "extraordinarily correct" and provided several specific examples of how information he had given pertaining to Leventhal, about whose operation Mr. C informed, had been corroborated. Moreover, the personal observations and admissions of Mr. C as to the Leventhal gambling operation were corroborated by Mr. A's information and by physical surveillance. (Handal Aff. ¶¶ 12, 14-16; L. App. 68-69). Clearly sufficient facts concerning Mr. C's reliability were set forth from which Amaditz concluded that Mr. C's information about his placing bets with the Leventhal operation was reliable. *See, e.g., United States v. McHale*, 495 F.2d 15 (7th Cir. 1974); *United States v. Becker*, 334 F. Supp. 546, 550 (S.D.N.Y. 1971), *aff'd*, 461 F.2d 230 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Rol-*

* *United States v. Karathanos*, 531 F.2d 26, 31-32 (2d Cir. 1976), which is relied upon by Loewinger (Br. at 11-12), is inapposite. In that case, the affidavit in support of the search warrant was found insufficient because there was no statement concerning how the single informant upon whose information the warrant was based reached his conclusion that criminal activity was afoot in the place sought to be searched; in addition, the affidavit was completely lacking in supporting detail as to a description of the accused's criminal activity. *See United States v. Kahan*, Dkt. No. 77-1216, slip op. 6597, 6608-09 (2d Cir., March 7, 1978).

lins, 522 F.2d 160, 164 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Canestri*, 518 F.2d 269 (2d Cir. 1975).

Finally, Loewinger claims that multiple hearsay is relied upon in the affidavits to a fatal extent. However, the only multiple hearsay set forth in the affidavits with respect to the informants is the information of Mr. A which was communicated to Amaditz through Senior Investigator Joseph Tripodo of the New York State Police. (Handal Aff. ¶¶ 8, 13; L. App. 65-66, 67-68). All other informant information in the affidavits is based on conversations between the informant and the affiant-agent, and the informants obtained their information from personal first-hand dealings and conversations with members of the gambling operation. These latter conversations are admissions by the subjects, and not hearsay. See *United States v. DeCasaro*, 502 F.2d 604, 608 (7th Cir. 1974). Moreover, Mr. A's information was related to criminal investigator Tripodo who conveyed the information to the affiant. That information is considerably more reliable than information conveyed from one informant to another informant who relates the initial informant's information to the affiant. Furthermore, Mr. A's information was corroborated by other informants and by physical surveillance. (Handal Aff. ¶¶ 10, 15, 17; L. App. 66, 68-69).

D. The Affidavits Properly Established Probable Cause to Believe that the Gambling Operation Was of the Magnitude Prohibited by 18 U.S.C. § 1955.

The defendants Finerow, Frielich and Adamiak claim that the information concerning the Melavsky organization's laying off bets with the Loewinger operation was so stale as to render erroneous the District Court's finding that there was probable cause to believe that more

than five persons were engaged in the operation of the illegal gambling enterprise.* Loewinger makes the bare assertion that some unspecified information in the affidavits linking Loewinger and Wertheimer to any three other persons is stale. A review of the affidavit supporting the issuance of the December 30, 1976 wiretap clearly demonstrates the correctness of Judge Cannella's decision expressly rejecting the claim that the staleness of the information precludes a finding of probable cause.** (Mem. at 6-7; L. App. 86-87).

The information in the December 30, 1976 affidavit clearly ties together the Loewinger-Leventhal-Melavsky operations and thus shows that more than five persons engaged in an illegal gambling operation.*** The Loewinger operation, which according to the affidavit had at least three members who could be specifically identified, was

* The concept of "laying off" bets is described in the Statement of Facts to this brief. See page 4 *supra*.

** In addition to probable cause that five or more persons participated in the gambling operation, probable cause was shown that the business was in "substantially continuous" operation for more than 30 days and had a gross revenue of more than \$2,000 in any single day, although only one or the other need be shown. The Amaditz affidavits clearly showed both elements, and the defendants do not claim otherwise in this Court. See Handal Aff. ¶¶ 10, 15-17, 21-24, 28-33; L. App. 66, 68-69, 70-72, 73-76.

*** In determining whether more than five persons engaged in the operation of an illegal gambling enterprise the Court must look to the entire gambling network and not simply to one part of the network. Persons who receive and exchange line and other information, persons who accept wagers and persons who make and accept lay off bets in a gambling operation are all held to be engaged in the same gambling enterprise. *United States v. DiMuro*, 540 F.2d 503 (1st Cir. 1976), *cert. denied*, — U.S. —, 97 S.Ct. 733 (1977); *United States v. Box*, 530 F.2d 1258, 1265-66 (5th Cir. 1976); *United States v. Bohn*, 508 F.2d 1145 (8th Cir.), *cert. denied*, 421 U.S. 947 (1975); *United States v. McHale*, 495 F.2d 15, 18 (7th Cir. 1974); *United States v. Sacco*, 491 F.2d 995, 1002-03 (9th Cir. 1974) (*en banc*); *United States v. Cesaro*, 467 F.2d 653, 656 (3d Cir. 1972).

connected to Leventhal's operation through the statement of Mr. A. Mr. A had stated to Agent Amaditz that as recently as during December 1976 he had overheard discussions between Wertheimer and Leventhal concerning Leventhal's laying off bets with the Loewinger operation. (Handal Aff. ¶ 8; L. App. 65-66). In addition, physical surveillance of Leventhal between August 16, 1976 and December 11, 1976 indicated numerous meetings between Leventhal and Loewinger, thus corroborating Mr. A's information that Leventhal was laying off bets with the Loewinger operation. (Handal Aff. ¶ 17; L. App. 69). Thus, as the defendants Finerow, Frielich and Adamiak concede, the affidavit, at the very least, shows two gambling establishments, each having four members: the Loewinger-Leventhal operation (Loewinger, Wertheimer, Leventhal, answering service operator) and the Melavsky operation (Melavsky, Finerow, Frielich and Hannon).

The facts set forth in the affidavit of December 30, 1976 also provide probable cause to believe that there was a link between the Melavsky operation and the Loewinger-Leventhal operation. The affidavit supporting the warrant referred specifically to four members of the Melavsky operation, and the affidavit tied that operation to the Loewinger-Leventhal operation through informants Mr. A and Mr. B. The defendants' claim that the affidavit is insufficient overlooks several indicia of reliability concerning Melavsky's statement to Mr. B in the summer of 1976 that he regularly lays off with Loewinger: (a) the admission was made by Melavsky himself; (b) Mr. B had had gambling related conversations with Melavsky during a period of eight months, the most recent of which was during the first seven days of December 1976; and (c) Mr. B, as a result of knowing Melavsky and placing bets with him for three years, knew him to have been conducting a gambling operation in Ellenville for more than five years. (Handal Aff. ¶¶ 9, 21; L. App. 66, 70-

71).^{*} Moreover, in conversations continuing until early December 1976 Melavsky had exhibited to Mr. B considerable knowledge regarding the Loewinger operation, telling him that Loewinger and Wertheimer were partners in the largest-volume bookmaking operation in the Catskill mountain area and that they had several accounts out of state and in New York City. (Handal Aff. ¶ 9; L. App. 66).

In addition, physical surveillance between August 12, 1976 and December 13, 1976 evidenced meetings in Ellen-ville and in Monticello between Melavsky and other members of his operation and members of the Loewinger and Leventhal operations, thus corroborating Mr. B's and Mr. A's information as to layoff betting among the groups. Among these meetings, there was surveillance of meetings between Leventhal and Frielich (a member of the Melavsky operation) at the County Seat Social Club, 46 Jefferson Street, Monticello, New York, which was where Mr. C had advised that Leventhal settled his accounts. (First Amaditz Aff. ¶¶ 38-40; F. & P. App. 28-32).

Thus, the affidavit contained information about a course of conduct extending over a long period of time, and this conduct was under continuous investigation for a considerable portion of that period.^{**} Much of the

^{*} Information from a single informant as to laying off of bets has been held sufficient probable cause that the participants are involved in one illegal gambling operation. *United States v. DeSesaro*, 502 F.2d 604, 609, 611 (7th Cir. 1974).

^{**} The suggestion of the defendants Finerow and Putzer that the information obtained in the summer of 1976 by Mr. B should have been acted upon at that time is preposterous. (Br. at 7). Law enforcement agencies should not be expected to act immediately upon isolated bits of information as that information becomes available. Certainly the approach to be encouraged is for the agencies to solidify the basis for probable cause by continuous investigation, as was done in this case.

information demonstrating the existence of a gambling enterprise with at least five members was obtained within weeks of the issuance of the wiretap order, and compares favorably with court decisions holding that particular time lapses did not render the information stale. *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 478-79 n.9 (1976) (three month lapse as to all information does not preclude finding of probable cause); *United States v. Scott*, 555 F.2d 522, 526-28 (5th Cir. 1977) (reliance on information approximately two years old approved for search warrant); *United States v. Guinn*, 454 F.2d 29, 35-36 (5th Cir.), *cert. denied*, 407 U.S. 911 (1972) (approving reliance on information concerning events more than six months prior to affidavit); *United States v. DiMuro*, 540 F.2d 503, 515-16 (1st Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 733 (1977) (information five months old not stale); *United States v. Rahn*, 511 F.2d 290 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975) (information in affidavit nearly two years old); *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975) (information in affidavit more than eighty-seven days old); *United States v. Harris*, 403 U.S. 573, 579 n.8 (1971) ("it was certainly reasonable for a magistrate, concerned only with a balancing of probabilities, to conclude that there was a reasonable basis for a search"); *United States v. Forsythe*, 560 F.2d 1127, 1132 (3d Cir. 1977).

While the affidavit clearly demonstrated the existence of a gambling operation with more than five specifically identified individuals, the District Court would have been justified in concluding that such an operation existed on the basis of the facts pertaining to the Loewinger-Leventhal operation alone or the Melavsky operation alone. In view of the extensive network of personnel required to operate an illegal gambling enterprise, evidence that at least four persons actually operate a gambling establishment certainly provides probable cause to believe that five or more persons are involved. For example, defendants

claim that the affidavit only reveals that four subjects are involved in the Melavsky organization and three subjects in the Loewinger operation. This calculation ignores the common sense conclusion that other individuals are essential to operate the type of gambling enterprise exemplified by the Loewinger-Leventhal and Melavsky operations—individuals such as professional handicappers who establish the odds on sporting events, those who lay off the bets, and others who accept the bets. *See First Amaditz Aff.* ¶ 4; F. & P. App. 4-9. The defendants' argument asks this Court to ignore the obvious inferences a District Judge can draw about the size of a gambling operation when presented with the facts as stated in Agent Amaditz's affidavit.*

E. The Government Adequately Set Forth Reasons Justifying the Need for the December 30, 1976 and the March 9, 1977 Orders.

Loewinger asserts that the affidavits in support of the wiretap orders failed to include a full and complete statement indicating either whether "other investigative techniques have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). As is amply demonstrated in the Government's affidavits, the Government fully described to the issuing Judges in connection with

* Defendants would require that before the Government can obtain a warrant in a case involving a gambling operation that the affidavit demonstrate beyond a reasonable doubt the existence of at least five specifically ascertainable and identifiable individuals. Of course no such requirement exists, and the Supreme Court's admonition in *Adams v. Williams*, 407 U.S. 143, 149 (1972), is particularly appropriate:

"Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction."

See also United States v. Williams, 459 F.2d 909, 913 n.4 (6th Cir. 1972).

each wiretap application the reasons the wiretaps were necessary in the investigation, (Handal Aff. ¶¶ 36-46; L. App. 77-80), and Judge Cannella's decision that the affidavits complied fully with the requirements of 18 U.S.C. § 2518(1)(c) was entirely correct, (Mem. at 8; L. App. 88).*

The Amaditz affidavits described at length the fruits of the investigation at the time of each application and thoroughly explained the reasons that wire interceptions were the only effective investigative procedure to achieve

*Loewinger also makes the following assorted claims: (a) that it is "ironic" that while the Government claims there is probable cause to obtain the wiretaps, it also states that there is insufficient evidence to determine the truth of immunized testimony; (b) that the affidavits provide no proof or allegations that the informants were offered protection or that their fears of testifying were real; and (c) that no facts and circumstances were provided regarding the 1973 failure at infiltration of the Loewinger organization. As to all three of these claims, the Government submits that even if they were correct, their total effect, in view of the case law in this Circuit, would be inconsequential in determining whether the Government has properly shown that other investigative techniques appeared reasonably unlikely to succeed. In any event, as to the first claim, that the Government has probable cause to believe that certain persons are involved in a gambling operation provides little aid in measuring the truthfulness of immunized testimony as to the specifics of the operation or even as to the total extent of the operation. Moreover, there is no reason the Government under Section 2518 (1)(c) should be confined to investigating illegal gambling operations through the use of immunized testimony. As to the second claim, the case law is clear that statements that informants are afraid to testify are sufficient on this aspect of investigative method without more. See, e.g., *United States v. DiMuro*, 540 F.2d 503, 510 (1st Cir. 1976), cert. denied, — U.S. —, 97 S. Ct. 733 (1977); *United States v. Esposito*, 423 F. Supp. 908, 912 (S.D.N.Y. 1976). As to the third claim, having given underlying facts for the statement in the affidavit that infiltration will not work in this situation—in part the 1973 unsuccessful infiltration attempt—the Government is not required to explain that attempt.

the goals of the investigation. (Handal Aff. ¶ 37; L. App. 77). Each of the Amaditz affidavits set forth the following concerning other investigative techniques: (1) the informants involved in this case refused to testify for reasons of fear; (2) continued physical surveillance lacked value to establish the crime beyond a reasonable doubt and was particularly noticeable in the relatively small towns involved; (3) gambling raids were considered fruitless because they had ordinarily not resulted in gathering the necessary physical or other evidence to prove the gambling offense since gamblers frequently do not keep permanent records; (4) direct investigative contacts with the bettors were potentially harmful in terms of alerting the subjects to the existence of the investigation; (5) infiltration of the operation was considered unlikely to succeed, and in 1973 an attempt at infiltration of this gambling operation had failed; (6) telephone toll records would be of little use in establishing contacts between principals since this operation centered largely within the local calling area; and (7) grand jury appearances would be unavailable as an alternative investigative tool because subjects would be unlikely to testify voluntarily, and grants of immunity would not be useful because of lack of knowledge as to the specifics of this particular operation, by which to measure the truthfulness of the testimony. The March 9, 1977 affidavit added that wire interception was necessary to obtain evidence against Loewinger and Wertheimer because their peculiar method of operation through the answering service made detection by techniques other than wiretapping particularly difficult.* (Handal Aff. ¶¶ 36-46; L. App. 77-80).

* The subjects' sensitivity to law enforcement investigation is indicated, for example, by the constant change of telephone numbers by Leventhal. (Handal Affidavit ¶ 13; L. App. 67-68). See *United States v. Hinton*, 543 F.2d 1002 (2d Cir. 1976), cert. denied, — U.S. —, 97 S. Ct. 796 (1977).

This showing plainly satisfied 18 U.S.C. § 2518(1)(c). As the Second Circuit stated in *United States v. Fury*, 554 F.2d 522, 530 (2d Cir. 1977):

"[T]he purpose of these 'other investigative techniques' requirements is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. . . . Moreover, the required showing is to 'be tested in a practical and commonsense fashion.' [S. Rep. No. 1097, 90th Cong. 2d Sess. (1968),] 1968 U.S. Code and Admin. News [2112], at 2190."

Thus, the Government need not prove that other investigative techniques will not prevail; and there is no requirement that every theoretically possible investigative method be exhausted prior to an application for authorization under Section 2518. The wiretap is not reserved for use only as a last resort. *E.g.*, *United States v. Vento*, 553 F.2d 838 (3d Cir. 1976); *United States v. Pacheco*, 489 F.2d 554 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975); *United States v. Falcone*, 364 F. Supp. 877 (D.N.J. 1973). Other investigative techniques need only "reasonably appear unlikely to succeed if tried." 18 U.S.C. § 2518(c); *United States v. Baynes*, 400 F. Supp. 285 (D.N.J. 1977), *aff'd without opinion*, 517 F.2d 1399 (3d Cir. 1975). The requirement is "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 495 U.S. 143, 153 n.12 (1974).

In light of these legal standards the District Court reasonably concluded that the information in the possession of the agents at the time the wiretaps were sought justified a finding that the operation was keyed to such a great extent to the telephone that further investigation

by other procedures would be futile. *See United States v. Steinberg*, 525 F.2d 1126 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Falcone*, 364 F. Supp. 877 (D.N.J. 1973). Indeed, one factor relied on by Judge Cannella in finding that the Government's affidavit amply demonstrated that other investigative tools were unlikely to succeed was the unavailability of informants to testify because of fear. (Mem. at 8-9; L. App. 88-89). This factor was relied upon by this Court in *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976), in holding that the wiretap affidavit demonstrated that investigative procedures other than wiretapping would be unlikely to succeed. In the instant case the affidavits supporting the warrant referred to the unavailability of informants willing to testify, as well as to a host of other factors detailed above which compel the conclusion that other investigative techniques have not succeeded and were not likely to succeed in the future.*

* A comparison of the Government's statements of need in the Amaditz affidavits with those recently approved in the Second Circuit clearly demonstrates that the Amaditz statements are to be considered extensive and more than sufficient. *See, e.g., United States v. Fury*, 554 F.2d 522 (2d Cir. 1977); *United States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 796 (1977); *United States v. Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Esposito*, 423 F. Supp. 908, 912 (S.D. N.Y. 1976). Moreover, the Court in *Steinberg* was not "greatly influenced" by the fact that at oral argument appellants could advance no logical alternative to wiretapping, as Loewinger contends. (Br. at 8). In *Steinberg*, this Court approved a statement of need significantly less comprehensive than that contained in the Amaditz affidavits, 525 F.2d at 1130. Indeed, the supporting affidavits in this case are in marked contrast to the affidavit criticized by this Court in *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1976). In that case the Court found that the affidavits provided mere conclusions by the affiant based solely on past experience that gambling conspiracies are "tough to crack". The Amaditz affidavits, on the other hand, were keyed to the situation presented by the precise gambling operation which was the subject of the investigation.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Kenneth V. Handal being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 21st day of March, 1977,
he served ^{two copies} ~~xxx~~ of the within brief by placing the same
in a properly postpaid franked envelope addressed to each
of the following:

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And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
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Kenneth V. Handal
Kenneth V. Handal

Sworn to before me this

21st day of March, 1978
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

